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ALLEGED CASES OF FRAUD IN THE UNITED NATIONS: STUDY OF THE POSSIBILITY OF THE ESTABLISHMENT OF A NEW JURISDICTIONAL AND PROCEDURAL MECHANISM OR OF THE EXTENSION OF MANDATES AND IMPROVEMENT OF THE FUNCTIONING OF EXISTING JURISDICTIONAL AND PROCEDURAL MECHANISMS

Internal disciplinary mechanisms

Note by the Secretariat

I. INTRODUCTION

1. Internal disciplinary mechanisms are governed by article X of the Staff Regulations and chapter X of the Staff Rules, which came into effect on 1 January 1990, as explained and amplified by administrative instruction ST/AI/371 of 2 August 1991.

2. All cases are preceded by an initial investigation and fact-finding, as described in paragraphs 3 to 6 below. When the initial investigation and fact-finding reveals the existence of serious misconduct, the Secretary-General has the authority to impose summary dismissal, as explained in paragraphs 7 to 11 below. Other cases where the initial investigation indicates that misconduct has occurred will be referred to a joint disciplinary committee (JDC), as explained in paragraphs 12 to 29 below.

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II. INITIAL INVESTIGATION AND FACT-FINDING

3. On the basis of a report submitted to the Director of Personnel (formerly the Assistant Secretary-General for Human Resource Management), setting forth the evidence gathered as a result of the initial investigation and any subsequent fact-finding, the Director decides whether or not the matter should be pursued as a disciplinary case.

4. If the investigation seems to indicate that misconduct has occurred, a staff member may be suspended pending investigation and disciplinary proceedings. Suspension of this nature is not a disciplinary measure and is always imposed without prejudice to the staff member's rights. Under staff rule 110.2, suspension may be imposed when it is in the interests of the Organization to do so, e.g., the conduct in question may pose a danger to other staff members or to the Organization or there is a risk of evidence being destroyed or concealed and redeployment is not feasible (see ST/AI/371, para. 4). Suspension pending investigation under rule 110.2 is normally with pay unless, in exceptional circumstances, the Secretary-General decides that suspension without pay is appropriate. Suspension without pay is usually imposed when the alleged misconduct is serious, as will always be the case in instances of fraud, and the evidence shows that the misconduct is patent. Suspension, with or without pay, should normally not exceed three months, but may be extended in view of the special circumstances of a particular case.

5. In all cases where the investigation seems to indicate that misconduct has occurred, allegations of misconduct are sent to the staff member, setting forth the charges made against him or her, together with a copy of the evidence of the alleged misconduct. The staff member is informed of his or her right to respond within a reasonable period, which is set for each case, and of his or her right to seek assistance of counsel in preparing the response. The deadline may be extended if the staff member makes a request to that effect, with proper justification. The Administrative Tribunal of the United Nations considers that due process requires the staff member to be informed of the charges and be given the right to respond and to be informed of the right to counsel. 1/ Those requirements, which have always been observed, were codified as follows in 1990 by staff rule 110.4 (a):

> "No disciplinary proceedings may be instituted against a staff member unless he or she has been notified or the allegations against him or her, as well as of the right to seek the assistance in his or her defence of another staff member or retired staff member, and has been given a reasonable opportunity to respond to those allegations."

6. Upon receipt of the staff member's response, or if no response is submitted within the specified time, the Office of Human Resources Management analyses all the facts and evidence and assesses the staff member's response to the allegations of misconduct. On the basis of that analysis, the Director of Personnel may:

(a) Decide to close the case when the staff member's conduct does not amount to misconduct or there is insufficient evidence to proceed (if appropriate, a letter of reprimand or caution may be sent to the staff member); or

(b) Refer the case to JDC if the facts and the evidence indicate that misconduct has occurred; or

(c) Recommend to the Secretary-General that the staff member be summarily dismissed if the misconduct is serious and the charges are supported by clear and convincing evidence.

III. SUMMARY DISMISSAL

7. The Secretary-General's authority to impose summary dismissal for serious misconduct is based on staff regulation 10.2, which provides:

> "He may summarily dismiss a member of the staff for serious misconduct."

Summary dismissal is normally imposed when the misconduct is patent, the evidence is clear or overwhelming and the conduct is clearly incompatible with the standards expected of international civil servants. The Tribunal has consistently recognized the Secretary-General's broad discretion to determine what constitutes serious misconduct and summarily to dismiss staff members who engage in it when the evidence supports the charge of serious misconduct. 2/

8. Fraud is serious misconduct. 3/ When fraud is patent and there is strong and clear evidence to support the charges (such as admission by the staff member, cashed cheques, documentary evidence of tampering with financial records, etc.), the conditions are met for the Director of Personnel to recommend to the Secretary-General that the staff member be summarily dismissed, taking into account any comments made by the staff member. The Administration does not have to establish beyond a reasonable doubt the existence of an actual intent to defraud the Organization, 4/ especially when a staff member has falsely certified that he or she meets the conditions for an entitlement. False certification, per se, is serious misconduct. 5/ The amount obtained through fraudulent means is not relevant, 6/ nor is the fact that the resulting loss to the Organization cannot be quantified. 7/

9. A recommendation of summary dismissal by the Director of Personnel is reviewed by the Office of Legal Affairs to make sure that the elements required for a legally valid summary dismissal are present. It is then considered by the Under-Secretary-General for Administration and Management, who has authority to approve the recommendation on behalf of the Secretary-General. Once all the evidence is assembled, the process can be completed very quickly.

10. If summary dismissal is approved, the staff member is informed of the decision and separated immediately. A staff member who is summarily dismissed loses any entitlement to termination indemnity (Staff Regulations, annex III), and to repatriation grant (Staff Regulations, annex IV).

11. Under the revised rules introduced on 1 January 1990, a staff member who has been summarily dismissed has the right under staff rule 110.4 (c) to request a review of the decision by a JDC. So far, no decision has been overturned after such a review. Appeals against the decision to impose summary dismissal can then be submitted to the Administrative Tribunal (staff rule 110.4 (d)).

IV. CASES REFERRED TO A JOINT DISCIPLINARY COMMITTEE

12. In all cases where the misconduct is not deemed to be serious enough to justify summary dismissal or where the facts are unclear, the case will be referred by the Director of Personnel to a JDC, except when the Administration and the staff member agree to waive referral to a JDC, in which case one of the disciplinary measures enumerated in staff rule 110.3 may be imposed immediately.

13. Staff rule 110.3 provides that disciplinary measures may take one or more of the following forms:

(a) Written censure by the Secretary-General;

(b) Loss of one or more steps-in-grade;

(c Deferment, for a specified period, of eligibility for within-grade increment;

(d) Suspension without pay;

(e) Fine;

(f) Demotion;

(g) Separation from service, with or without notice or compensation in lieu thereof, notwithstanding rule 109.3;

(h) Summary dismissal.

The possibility of imposing summary dismissal after a case had been referred to a JDC was introduced in 1990 to take into account those cases where the misconduct was serious but not fully supported by clear evidence at the conclusion of the initial investigation, thus preventing an immediate recommendation for summary dismissal without referral to a JDC. Further fact-finding by a JDC may provide the necessary evidence for a determination that serious misconduct had, in fact, occurred. Summary dismissal imposed after a JDC will trigger the application of annexes III and IV to the Staff Regulations, which will deny to the staff member the benefit of any entitlement to termination indemnity and repatriation grant.

14. JDCs are established pursuant to staff regulation 10.1, which provides:

> "The Secretary-General may establish administrative machinery with staff participation which will be available to advise him in disciplinary cases."

15. Standing JDCs now exist in New York, Geneva and Vienna. For each case, the Presiding Officer of the JDC constitutes a panel, which will be composed of a chairperson (from a list of staff members appointed by the Secretary-General in consultation with the staff), one member from a list of staff members appointed by the Secretary-General, and one member from a list of staff members elected for that purpose by the staff (see staff rule 110.6).

16. When a case presents issues requiring specialized knowledge for a proper understanding of those issues or in any situation where the Secretary-General determines that a standing JDC would not be appropriate, the Secretary-General may establish an ad hoc JDC, which will consider a particular case or a series of cases.

17. The conduct of disciplinary cases at duty stations away from headquarters, and particularly at small duty stations, has always been problematical. It is obviously necessary to do the main fact-finding and investigation in situ and it would also obviously be impractical to transport the staff member, counsel, witnesses and evidence to a headquarters JDC. Until 1990, when revised disciplinary measures were introduced, 9/ cases arising at duty stations away from headquarters were conducted under the provisions of personnel directive PD/1/76, which was intended to provide a fact-finding mechanism, and to ensure the respect of basic due process rights. Under the directive, the head or office or mission designated a local committee or group that examined the evidence, gave a hearing to the staff member and counsel and reported to the head of the office or mission, who was required to evaluate the recommendation before referring it to Headquarters for a decision.

18. The reports under directive PD/1/76 were of uneven quality, largely owing to inexperience in evaluating evidence and to the lack of local staff with legal skills. There were also occasional complaints that the Head of office had exercised undue influence. Nevertheless, by and large, the procedure worked reasonably well, and was held by the Tribunal to be fully protective of the rights of staff members. 9/

19. In the revised disciplinary procedures introduced in 1990, directive PD/1/76 was replaced by an ad hoc JDC mechanism intended to duplicate, as far as possible, the procedures at headquarters JDCs. What was not foreseen at the time the rules were revised was the explosion of peace-keeping missions and the particular problems that would arise in special missions situations. Nor was the complexity of the new mechanism fully appreciated. Unquestionably, the procedures set out in administrative instruction ST/AI/371 are too cumbersome to be useful in many situations, and the Administration is at present considering ways to adapt these, as well as other administrative procedures, to the current realities of the Organization.

20. An ad hoc JDC under administrative instruction ST/AI/371 requires:

(a) A decision by the Director of Personnel to refer a case to a JDC;

(b) A decision by the Under-Secretary-General for Administration and Management on behalf of the Secretary-General to constitute an ad hoc JDC;

(c) Notification of the above decision to the head of office or mission, who must propose, for the composition of the JDC:

(i) The name of a chairperson (after consultation with the staff); and

(ii) Three names of staff members nominated by the head of the office; and

(iii) Three names of staff members nominated by the staff at the duty station;

(d) Since there is no "staff representative body" at special missions, consultations must be held with staff representative bodies elsewhere;

(e) The composition must be approved by the Under-Secretary-General for Administration and Management on behalf of the Secretary-General.

21. Several weeks or more are usually involved in the process of consultation with staff over the chairperson and in the selection of staff nominated by the staff representative bodies. The process is particularly long and arduous in small duty stations where the limited number of staff may render it difficult to find suitable staff members who are not already familiar with particular aspects of the case and/or are not too closely associated with either the Administration or the staff member charged with misconduct. Moreover, given the mobility of staff at special missions, by the time all these consultations have been completed and the membership of a JDC approved, one or more of the members may well have become unavailable and the process has to start again.

22. At certain duty stations (Nairobi and the regional commissions), administrative instruction ST/AI/371 attempts to resolve the difficulty of composing a JDC by providing a Presiding Officer, who will constitute an ad hoc JDC of which he or she, or someone designated by him or her, shall be the chairperson. The Presiding Officer is to select the other two JDC members, one from a list of at least three names submitted by the head of the office, the other from a list of at least three names nominated by the staff representative body at the duty station. Thus, once a Presiding Officer has been designated, it is no longer necessary for Headquarters to be involved in the composition of the ad hoc JDC. To date, however, Presiding Officers have been designated only at Nairobi and Santiago. Despite repeated requests, the other regional commissions have not submitted nominations for Presiding Officers, and, in any case that arises, the JDC members must still be appointed by the Secretary-General.

23. When a case is referred to an ad hoc JDC away from headquarters, the office involved often lacks experience and training in such matters and requests the Office of Human Resources Management to prepare a written presentation of the case, setting forth the charges, the facts, the evidence and the relevant legal principles and highlighting, where appropriate, those areas where additional fact-finding or determination of credibility is necessary.

24. Once a JDC, standing or ad hoc, has been seized of a case, the Director of Personnel in New York, or the designated official at other duty stations, transmits to the staff member the entire dossier submitted to the JDC and advises the staff member of his or her right to be represented by any serving or retired staff member at the duty station where the JDC has been established. In addition, the staff member is informed of the composition of the JDC and advised of his or her right to submit any written observations to the JDC within a specified time, and of his or her right to suggest other persons of whom inquiry might be made and to request that hearings be held and witnesses called.

25. Staff rule 110.7 and paragraphs 17 to 19 of administrative instruction ST/AI/371 contain the rules of procedure to be followed by the JDC.

26. Even though staff rule 110.7 mandates JDCs to act "with maximum dispatch" and to provide advice to the Secretary-General "within four weeks after the case has been submitted to it", the process in fact takes much longer as the rules provide for the staff member to be given the opportunity to submit a written response to the presentation made by the Administration. This, alone, may take four weeks or more when the JDC grants extension(s) to the staff member for submitting a written response.

27. The JDC will consider the case after receiving the Administration's presentation, and the comments of the staff member, if any. The proceedings may be limited to the consideration of written documents, but, in many cases, they involve hearing(s) which the staff member and an official representing the Administration are invited to attend. Witnesses may be heard, which may mean substantial delays when those witnesses are temporarily away on mission or on leave and when their return occurs at a time when one or more members of the JDC are themselves on mission or on leave. The most simple cases usually take several months.

28. After concluding its consideration of the case, the JDC prepares a report containing recommendations as to what disciplinary measures, if any, should be applied. The report is forwarded to the Under-Secretary-General for Administration and Management who, in most cases, will make a decision on behalf of the Secretary-General. In some sensitive cases, the decision will be made by the Secretary-General himself.

29. In accordance with Article 97 of the Charter of the United Nations, which recognizes the Secretary-General as the chief administrative officer of the Organization, JDCs can provide only advice, which is not binding on the Secretary-General. The Administrative Tribunal has repeatedly held that the Secretary-General has broad discretion in disciplinary matters, including determination of what constitutes misconduct as well as what constitutes an appropriate sanction. 10/ Neither a particular finding of fact, nor a recommendation for a given disciplinary measure, is binding on the Secretary-General, especially if it is found that the JDC has not properly applied the legal principles that govern the particular facts of the case.

Notes

1/ See, for instance, judgements Nos. 123 Roy (1968), sect. V, 183 Lindblad (1974), sects. VI and VII, 340 Lebaga (1984), sects. V and VI, 558 Farug (1992), sect. V.

2/ See, for instance, judgements Nos. 479 Caine (1990), sect. III, 484 Omosola (1990), sects. II and III, 494 Rezene (1990), sect. IV, 510 Camara (1991), sect. II and 515 Khan (1991), sect. II.

3/ The consistent jurisprudence of the Administrative Tribunal supports this statement. See, for instance, judgements Nos. 424 Ying (1988), sect. XV, 425 Bruzual (1988), sect. X, and 445 Morales (1989), sect. IV.

4/ See judgements Nos. 445 Morales (1989), sect. IV, 479 Caine (1990), sects. III and XV and 490 Liu (1990), sect. VIII.

5/ Judgements Nos. 424 Ying (1988), sect. XVII, 425 Bruzual (1988), sect. XII, 445 Morales (1989), sect. IV.

6/ Judgement No. 425 Bruzual (1988), sect. XII.

7/ See judgement No. 515 Khan (1991), sect. XI.

8/ Revised disciplinary rules were introduced after repeated calls from the General Assembly. See resolution 44/185 B of 19 December 1989 and resolution 43/224 B of 21 December 1988.

9/ Judgement No. 351 Herrera (1985), sect. II. The Administration is bound to respect the established procedures. Thus, since chapter X now requires all JDCs to be constituted with staff participation, this must be done. There is, however, no general due process requirement that a fact-finding or advisory body in disciplinary matters be constituted with staff participation. See judgements Nos. 515 Khan (1991), sect. XVII, and 583 Djimbaye (1992), sect. VII.

10/ See, for instance, judgements Nos. 210 Reid (1976), sect. IV, 394 Armijo (1987), sect. XII, 429 Bevele (1988), sect. IX, 529 Dey (1991), sect. V, and 558 Farug (1992), sect. XII.